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No. 93-1829

In the Supreme Court of the United States

OCTOBER TERM, 1994

BLACK HILLS INSTITUTE OF GEOLOGICAL RESEARCH, ET AL., PETITIONERS

v.

UNITED STATES DEPARTMENT OF JUSTICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the sale of a fossilized Tyrannosaurus rex skeleton by an Indian to petitioners was legally void because the fossil was discovered in land held in trust by the United States for the Indian and the United States did not approve the transaction.

2. Whether the seizure of the fossil from petitioners by federal agents without prior notice or opportunity for a hearing violated due process.

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In the Supreme Court of the United States

OCTOBER TERM, 1994

No. 93-1825

BLACK HILLS INSTITUTE OF GEOLOGICAL RESEARCH, ET AL., PETITIONERS

v.

UNITED STATES DEPARTMENT OF JUSTICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 85-121) is reported at 12 F.3d 737. The court of appeals' order denying rehearing (Pet. App. 122-123) is reported at 12 F.3d 746. The opinion of the district court (Pet. App. 52-81) is reported at 812 F. Supp. 1015. The district court's order denying a motion for reconsideration (Pet. App. 82-84) is unreported. Two prior opinions of the court of appeals are reported at 978 F.2d 1043 and 967 F.2d 1237.

JURISDICTION

The judgment of the court of appeals was entered on December 15, 1993, and a timely petition for rehearing was denied on February 2, 1994. Pet. App. 122-123. The

petition for a writ of certiorari was filed on May 2, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Under a patent deed dated September 23, 1969, the United States holds in trust almost 2,000 acres of ranch land within the Cheyenne River Sioux Tribe Reservation in South Dakota for the sole use and benefit of Maurice A. Williams (Williams), an individual Indian of that Tribe. The trust instrument provides that the United States "will hold the land * * * (*subject to all statutory provisions and restrictions*) for the period of twenty-five years, in trust for the sole use and benefit of [Williams], and at the expiration of said period the United States will convey the same by patent to [Williams] in fee" (emphasis added).[1] The land was placed into trust pursuant to the Indian Reorganization Act of 1934, ch. 576, 48 Stat. 984, 25 U.S.C. 461 *et seq.* Pet. App. 53-57, 96-97.

2. "An essential characteristic of most Indian allotments is a federally imposed restraint against alienation." F. Cohen, *Handbook of Federal Indian Law* 618 (1982). The Indian Reorganization Act provides that, with certain exceptions, "no sale, devise, gift, exchange, or other transfer of restricted Indian lands * * * shall be made or approved." 25 U.S.C. 464. The Act of June 25, 1910, ch. 431, § 5, 36 Stat. 857, makes it a criminal offense "to induce any Indian to execute any contract, deed, mortgage, or other instrument purporting to convey any land or any interest therein held by the United States in trust for such Indian." 25 U.S.C. 202.

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[1] The trust relationship expires on September 23, 1994.

Consistent with these statutory provisions, it is well established that a sale of an interest in Indian trust land contrary to federal restrictions on alienation is void. See, *e.g.*, *Heckman* v. *United States*, 224 U.S. 413, 438 (1912). Trust land may be alienated, however, if the government approves the transaction. The Act of May 14, 1948, ch. 293, 62 Stat. 236, vests the Secretary of the Interior with discretionary authority to approve applications "to remove restrictions against alienation, and to approve conveyances, with respect to lands or interests in lands" held in trust for Indians. 25 U.S.C. 483. See also 25 C.F.R. 152.22(a) ("Trust or restricted lands, * * * or any interest therein, may not be conveyed without the approval of the Secretary.").[2]

3. In August 1990, Sue Hendrickson, a researcher with petitioner Black Hills Institute of Geological Research, discovered a fossilized skeleton of a Tyrannosaurus rex on the land held in trust for Williams.[3] Soon thereafter, Black Hills Institute began to excavate the fossil. Petitioners claim that on August 27, 1990, Black Hills Institute paid Williams $5,000 in exchange for the fossil. Williams did not apply to the Secretary for approval of that transaction, nor did the Secretary approve it. When the excavation of the fossil was complete, Black Hills Institute moved the fossil to Hill City, South Dakota, and assigned its rights in the fossil to petitioner Black Hills Museum of Natural History

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[2] The regulation quoted in the text also specifically warns that "inducing an Indian to execute an instrument purporting to convey any trust land or interest therein * * * is prohibited and criminal penalties may be incurred. (See 25 U.S.C. 202 and 348)." 25 C.F.R. 152.22(a).

[3] The fossilized remains of the Tyrannosaurus rex are approximately 65 million years old and weigh ten tons. The dinosaur has been nicknamed "Sue" after its discoverer. Pet. App. 53, 88-89.

Foundation. In May 1992, federal agents, acting pursuant to a warrant, seized the fossil and moved it to the South Dakota School of Mines and Technology, where it remains today. The seizure was ordered by the United States Attorney for the District of South Dakota, who then believed that the excavation and removal of the fossil may have violated the Antiquities Act of 1906, 16 U.S.C. 431-433, and other federal statutes. Pet. 1; Pet. App. 53-54, 57-58, 88-89, 95-96, 99; see also 967 F.2d at 1238-1239.

4. Following seizure of the fossil, petitioners filed suit in the United States District Court for the District of South Dakota, requesting (in their second amended complaint) that the court enter an order requiring the United States to return the fossil to their permanent possession. Pet. App. 59-62.[4] On cross-motions for summary judgment, the district court held that, because the fossil was part of the land held in trust for Williams, and because the Secretary did not approve the sale, petitioners "obtained no legal right, title, or interest in the fossil." *Id.* at 79. Accordingly, the district court concluded that "the government was entitled to possession [of the fossil]," *id.* at 80 n.7, and it entered judgment against petitioners, *id.* at 80. The district court also denied petitioners' motion for reconsideration, *id.* at 82-84, which it characterized as "frivolous," *id.* at 83.

5. The court of appeals affirmed. Pet. App. 85-121. The court reasoned that, to determine whether petitioners should be given possession of the Tyrannosaurus rex, it would be necessary to decide who actually owns

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[4] Petitioners unsuccessfully sought a preliminary injunction requiring return of the fossil pending the outcome of the litigation. Pet. App. 89-90; see 978 F.2d 1043; 967 F.2d 1237.

the fossil. *Id.* at 94-96. On that issue, the court ruled, first, that the fossil was discovered on land held in trust for Williams by the United States, and second, that under governing federal laws and regulations, Williams could not alienate an interest in the land without the approval of the Secretary. *Id.* at 96-99. Thus, the key question, in the court's view, was whether the fossil constituted "land," within the meaning of those laws and regulations, at the time it was excavated. *Id.* at 100-101. The court reasoned that, although that question was ultimately one of federal law, it was appropriate to refer to state-law property concepts. *Id.* at 101-102. Because under South Dakota law, "land" is defined as the "the solid material of the earth, whatever may be the ingredients of which it is composed, whether soil, rock, or other substance," S.D. Codified Laws Ann. § 43-1-4 (1983), the court held that the fossil was "land" within the meaning of 25 U.S.C. 464 and 483. Pet. App. 102-103. The court explained:

> Sue Hendrickson found the fossil embedded in the land. Under South Dakota law, the fossil was an "ingredient" comprising part of the "solid material of the earth." It was a component part of Williams' land, just like the soil, the rocks, and whatever other naturally-occurring materials make up the earth of the ranch.

Id. at 103. The court therefore concluded that "[b]ecause he did not seek the Secretary's approval, * * * Williams' attempted sale to [petitioners] is void and * * * the United States holds Sue [the fossil] in trust for Williams

pursuant to the trust patent." *Id.* at 105 (footnote omitted).[5]

The court of appeals also rejected petitioners' claim that they had been deprived of due process because the government seized the fossil without first affording them notice and an opportunity for a hearing. "Because we find that [petitioners] ha[ve] no interest in Sue," the court reasoned, "we reject [their] claim that the lack of a pre-deprivation hearing violated [their] rights." Pet. App. 113-114. Citing *United States* v. *James Daniel Good Real Property*, 114 S. Ct. 492 (1993), petitioners renewed their due process argument in a petition for rehearing. The court denied rehearing, distinguishing *James Daniel Good* on the ground that "it was undisputed that Good owned the real property that the government had seized without first providing Good with an adversary hearing," whereas in this case "the panel determined that [petitioners] did not own the property in question." Pet. App. 122-123.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court. The courts below merely applied a settled rule of Indian law—that the sale of an interest in Indian land held in trust by the United States without the permission of the government is void—in a specific factual context. Moreover, petitioners' due process claim furnishes no basis for them to recover the fossil. Accordingly, further review is unwarranted.

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[5] The court rejected the contention that, after its excavation, the fossil became an alienable form of personal property under *United States* v. *Paine Lumber Co.*, 206 U.S. 467 (1907). The court instead followed *Starr* v. *Campbell*, 208 U.S. 527 (1908), which had distinguished *Paine Lumber*. Pet. App. 99-100 & n.4.

1. Petitioners argue (Pet. 40-48) that the court of appeals' holding that the fossil could not be sold without the government's approval is contrary to *United States* v. *Paine Lumber Co.*, 206 U.S. 467 (1907). That contention is meritless.[6] In *Paine Lumber*, Indians cut and sold timber from restricted land without government approval, and the United States sued to recover the value of the timber. The Court held that, even though the Indians could not alienate the land, the sale of the timber was valid. Writing for the Court, Justice McKenna emphasized that the land was allotted to the Indians with the intent that it be used as farm land, and hence that removal of the timber actually improved the suitability of the land for its intended use. See *id.* at 473-474. The meaning of *Paine Lumber* was clarified one year later in *Starr* v. *Campbell*, 208 U.S. 527 (1908), in which the Court held that a sale of timber cut from Indian trust land was void. Justice McKenna, writing for the Court once again, distinguished his own opinion in *Paine Lumber* on the ground that there "the land granted was

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[6] Petitioners do not expressly challenge the court's related holding that the fossil was "land" for purposes of the federal laws barring alienation of trust lands. That holding was in any event correct. A fossil is analogous to other naturally occurring resources constitutive of land. Cf. *United States* v. *Shoshone Tribe of Indians*, 304 U.S. 111, 116 (1938) ("Minerals and standing timber are constituent elements of the land itself."). A fossil is not the actual remains of a plant or animal that perished long ago. Rather, "[f]ossils are generally formed when animals or plants die and are buried in sediment before they can decompose. The skeletal structure or remaining impressions are gradually replaced by minerals in the same form as [the living] animal or plant." Lazerwitz, *Bones of Contention: The Regulation of Paleontological Resources on the Federal Public Lands*, 69 Ind. L.J. 601, 604 n.11 (1994), citing R. Fortey, *Fossils: the Key to the Past* 9 (1991). Fossils, then, are no less "land" than other minerals deposits.

arable, and could be of no use until the timber was cut," whereas in *Starr* v. *Campbell*, the land at issue was "all timber land" and the timber constituted 15/16 of the land's value. 208 U.S. at 534. "The restraint upon alienation would be reduced to small consequence," the Court concluded, were the timber "left to the unrestrained or unqualified disposition of the Indian." *Ibid.*

This case is much closer to *Starr* v. *Campbell* than it is to *Paine Lumber*. Unlike *Paine Lumber*, excavation of the fossil was not necessary for Williams' land to be of productive use, and it certainly did not increase the land's value. And like the timber in *Starr* v. *Campbell*, the fossil was a highly valuable part of the land and hence falls squarely within the policies of the statutory restrictions on alienation.[7] Accordingly, the court of appeals correctly concluded that *Starr* v. *Campbell* rather than *Paine Lumber* is the more relevant precedent. Pet. App. 99-100 & n.4, 104-105.[8]

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[7] Strangely enough, petitioners dispute that the fossil is valuable. Pet. 46. The record, however, establishes that this exceedingly rare paleontological find is extremely valuable. One witness in a prior proceeding described the fossil as "priceless," and there was other evidence that reproductions of the fossilized skeleton, following its restoration, could be sold for $100,000 each. Pet. App. 76. By at least one estimate, the Tyrannosaurus may be worth several million dollars. See Villarreal & Zacharakis, *"Where Did You Dig Up That Old Fossil?": Will Universities Own the Research Specimens that They Collect or Purchase?*, 20 J.C. & U.L. 225, 228 (1993).

[8] After arguing that the decision below is contrary to *Paine Lumber*, petitioners assert that "[f]ossils are fundamentally different from timber" because (1) a significant investment of time and money is necessary to make them valuable, and (2) a fossil exposed to the elements will lose its (potential) value if it is not excavated promptly. Pet. 47. Those observations do not justify a "fossil exception" to the rule that trust land is inalienable. First,

Petitioners also argue that, because Williams assertedly placed his land in the trust of the United States solely to avoid state taxation, restricting his ability to sell the fossil "does nothing to further the objective" of the trust. Pet. 43. That argument, however, is wide of the mark. The patent deed creating the trust provides that Williams' land is "subject to all statutory provisions and restrictions" during the trust period. Pet. App. 55. Therefore, whatever Williams' motives might have been, the full force of the federal laws and regulations governing the alienability of Indian trust land applies to his property.

2. Relying heavily upon *United States* v. *James Daniel Good Real Property*, *supra*, petitioners also claim (Pet. 11-29) that the seizure of the fossil deprived them of property without due process because the seizure was not preceded by notice or an opportunity for a hearing. The court of appeals, which specifically considered *James Daniel Good*, rejected petitioners' claim on the view that, because the fossil never belonged to petitioners in the first place, they had no property right subject to due process safeguards. Pet. App. 122-123; see also *id.* at 113-114.

At the outset, it is far from clear that the analysis of, or the conclusion reached in, *James Daniel Good* applies in this case. *James Daniel Good* was a civil action in which the government sought forfeiture of a house. This Court, applying the three-part test of *Mathews* v. *Eldridge*, 424 U.S. 319 (1976), held that the owner of the

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other natural resources appurtenant to land, such as timber and minerals, also require an initial investment before they may be profitably sold. Second, inasmuch as the fossil "Sue" was in the earth for 65 million years, petitioners cannot seriously contend that its excavation was demanded by exigent circumstances.

house was entitled to predeprivation notice and hearing. See *James Daniel Good*, 114 S. Ct. at 501-504. In so doing, the Court distinguished *Calero-Toledo* v. *Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974), in which it had found no right to preseizure notice and hearing, on the ground that *Calero-Toledo* involved moveable personal property (a yacht), not real property. See *James Daniel Good*, 114 S. Ct. at 500. Here, the fossil was seized during a criminal investigation, at a time when it had already been severed from the land. Because the pieces of the fossil are moveable, and because *Mathews* v. *Eldridge*, *supra*, has little if any application in the criminal context, see *Medina* v. *California*, 112 S. Ct. 2572, 2576 (1992), what the Due Process Clause requires in this case may well be quite different than what it required in *James Daniel Good*. Cf. *James Daniel Good*, 114 S. Ct. at 505 n.3 ("We do not address what sort of procedures are required for preforfeiture seizures of real property in the context of criminal forfeiture.").

Even if we assume *arguendo*, however, that petitioners were entitled under *James Daniel Good* to predeprivation notice and an opportunity for a hearing, petitioners still would not be entitled to the relief they request—*i.e.*, the return of the fossil. It has been determined in this very litigation that petitioners do not own, and have no right to possess, the fossil. Indeed, since the transaction in which petitioners sought to purchase the fossil was void *ab initio*, in the eyes of the law they have never owned the fossil, even prior to the allegedly unconstitutional seizure. Because petitioners' due process claim, even if meritorious, would not call into question the court of appeals' resolution of the underlying ownership issue, it cannot provide a basis for awarding them permanent possession of the fossil. See *United States* v. *Property at 4492 South Livonia Road*,

889 F.2d 1258, 1265 (2d Cir. 1989) ("Various circuit courts have held that the illegal seizure of property, standing alone, will not immunize that property from forfeiture, so long as impermissibly obtained evidence is not used in the forfeiture proceeding."). This view, moreover, is consistent with the view expressed by the court of appeals in *James Daniel Good* itself. See *United States* v. *James Daniel Good Property*, 971 F.2d 1376, 1384 (9th Cir. 1992) ("If on remand the district court finds the filing of this proceeding to be timely, the violation of Good's due process rights need not invalidate the forfeiture. * * * Good is, however, entitled to the rents accrued during the illegal seizure of his home."), aff'd in part and rev'd in part, 114 S. Ct. 492 (1993).[9]

It is a general rule of constitutional law that "remedies should be tailored to the injury suffered from the constitutional violation and should not unnecessarily infringe on competing interests." *United States* v. *Morrison*, 449 U.S. 361, 364 (1981). Here, even if petitioners should have been given notice and an opportunity for a hearing before seizure of the fossil, returning the fossil to them on a permanent basis would bear no relation to the injury they suffered. At the same time, that "remedy" would obviously affect the interests of Williams, as the beneficial owner of the land from which the fossil was excavated, and the United States, as trustee thereof.[10]

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[9] This Court did not address the remedies issue in *James Daniel Good*.

[10] Petitioners seek only equitable relief requiring that the fossil be returned to their possession. Pet. App. 60, 91. They have not sought damages for an alleged due process violation based on the failure to afford them predeprivation notice and an opportunity for a hearing. Cf. *Carey* v. *Piphus*, 435 U.S. 247, 266-267 (1978) (only nominal damages available in suit under 42 U.S.C. 1983 for

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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due process violation when governmental action was justified on the merits); but cf. *United States* v. *Hopkins*, 427 U.S. 123, 130 (1976) (no waiver of sovereign immunity under Tucker Act for due process violation).